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SUPREME COURT OF THE UNITED STATES

October Term, 1988

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SUPREME COURT, U.S.

DOCK McKOY, JR., Petitioner,

v.

STATE OF NORTH CAROLINA, Respondent

SUPPLEMENTAL AND REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

Petitioner, Dock McKoy, respectfully submits this supplemental and reply brief pursuant to Rules 22.5 and 22.6 of the Rules of this Court in support of the Petition for a Writ of Certiorari docketed in this Court on November 17, 1988. Petitioner is filing this brief at this time to highlight the recent decision of the Supreme Court of North Carolina in *State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316, *cert. granted, vacated and remanded,* ___ U.S. ___, No. 88-6833 (October 3, 1988), *prior decision adhered to,* 323 N.C. 622, 374 S.E.2d 622 (1988); to modify his prayer for relief in light of this action; and, to address arguments first raised by the Brief of Respondent in Opposition to the Petition for Certiorari.

I. THE REMAND IN LLOYD

The Question Presented in the instant petition is whether North Carolina's capital sentencing prodedure, which explicitly precludes jurors from considering mitigating evidence unless all twelve jurors unanimously find it to make out a

mitigating circumstance, violates this Court's holding in *Mills v. Maryland*, 486 U.S. ___ (1988).

Oscar Lloyd, another North Carolina death row inmate, is presently petitioning this Court for a writ of certiorari on substantially the same issue.[1] On October 3, 1988, this Court granted Lloyd's petition, and vacated and remanded the judgment of the North Carolina Supreme Court for further consideration in light of *Mills*. *Lloyd v. North Carolina*, ___ U.S. ___, No. 87-6833 (1988). Three days later, in affirming another North Carolina death penalty, the North Carolina Supreme Court reaffirmed its holding in McKoy. *State v. Allen*, 323 N.C. 208, 372 S.E.2d 855 (1988).

The North Carolina Supreme Court's decision in *Allen* foreshadowed the action it would take in *Lloyd* on remand from this Court. One day after the instant petition was docketed in this Court, the North Carolina Supreme Court on November 18, 1988 reinstated its prior decision in *State v. Lloyd*. The entire order reads,

> Upon receipt and consideration of the mandate of the Supreme Court of the United States in this cause, issued 3 October 1988, the following order was entered and is hereby certified to the Superior Court, Cherokee County.
>
> On 3 October 1988 the Supreme Court of the United States vacated our opinion reported at 321 N.C. 301, 364 S.E.2d 316 (1988), and remanded this cause for reconsideration in light of Mills v. Maryland, 486 U.S. ___, 100 L.Ed.2d 384 (1988). Upon such reconsideration, for the reasons set forth in our opinion in State v. McKoy, 323 N.C. 1, 372 S.E.2d 12 (1988), we continue to adhere to our opinion reported at 321 N.C. 301, 364 S.E.2d 316 (1988). Therefore, the mandate of that opinion is hereby reinstated.
>
> Done by the Court in conference, this the 17th day of November, 1988.

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[1] The Question Presented in *Lloyd v. North Carolina*, No. 87-6833, *cert. petition docketed* April 22, 1988, was "Whether the Eighth and Fourteenth Amendments are violated when the sentencing jury at the penalty phase of a capital murder trial is instructed that it must unanimously find the existence of a mitigating circumstance before any member of the jury may give weight to the mitigating circumstance in the actual decision between life and death?"

This order was dissented to by Chief Justice Exum and Justice Frye, the dissenters from the court's opinion in *McKoy*.[2]

The North Carolina Supreme Court hence appears unwilling to reconsider its position. Petitioner, therefore, must to this Court to grant the relief to which he is, under *Mills*, clearly entitled.

II. REPLY TO NEW ARGUMENTS

The Petitioner anticipated and answered most of the State's arguments opposing certiorari. The State has added a few new arguments, none of which have merit and to which the Petitioner will reply below.

First, the State cites *Adamson v. Ricketts*, No. 84-2069 (9th Cir. Dec. 22, 1988) (limited en banc), apparently for the proposition that if this Court holds for the Petitioner, "then any instruction requiring the jury or individual jurors to hold the defendant to any standard of proof as to evidence presented is just as violative of *Mills* and *Lockett* as the unanimity requirement." Brief in Opposition, p. 14. This position is completely unsupported. The Petitioner has not raised in this petition the question of whether the State may impose a burden of persuasion upon a capital defendant to prove mitigation. Indeed, the North Carolina capital sentencing scheme includes such a burden of persuasion on the defendant to prove the existence of mitigation by a preponderance of the evidence. *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597 (1979). Rather the question before this Court is whether the State may allow one holdout juror to preclude the entire jury from considering mitigating circumstances which eleven of the twelve jurors found by a preponderance of the evidence. That question was firmly decided in the Petitioner's favor in *Mills*.

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[2] Oscar Lloyd has petitioned this Court for a writ of certiorari to review the Supreme Court of North Carolina's November 18, 1988 Order. *Lloyd v. North Carolina*, No. 88-6348.

The State also argues that North Carolina's unanimity requirement fosters reliability by enhancing group deliberation and ensuring that the decision on mitigation reflects the entire cross-section of the community. Brief in Opposition, pp. 15-18. This argument likewise is utterly without merit. In North Carolina the decision to find and consider mitigation must be unanimous, but the decision to ignore, or as the State would have it--determine irrelevant, evidence of mitigation may be made by a lone holdout juror. A system that permits a single rogue juror to preclude consideration of mitigating evidence by the entire jury does not promote reliability. Furthermore, this Court has held that unanimity in jury verdicts does not necessarily enhance reliability. *Johnson v. Louisiana*, 406 U.S. 356 (1972) (a non-unanimous verdict "raises no questions of constitutional substance about either the integrity or the accuracy of the majority verdict.").

Thus in North Carolina, as in Maryland before *Mills*, a single juror could force the exclusion of mitigating evidence from the case and thereby require the imposition of the death penalty despite the existence of mitigation that would cause eleven of the twelve jurors to vote for life if they were allowed to consider it. Such a system can hardly be called reliable, and certainly not in the sense required by the Eighth Amendment; in fact, "it would certainly be the height of arbitrariness to allow or require the imposition of the death penalty under the circumstances so postulated by the petitioner." *Mills*, 486 U.S. at ___ (1988).

III. PRAYER FOR RELIEF

In his Petition for Writ of Certiorari, Petitioner requested that this Court grant the petition, issue the writ, and summarily reverse the sentence of death affirmed by the North Carolina Supreme Court in light of *Mills v. Maryland*, 486 U.S. ___ (1988). Alternatively, the Petitioner requested that this Court grant the petition, and vacate and remand the judgment of the North Carolina Supreme Court for further consideration in light of *Lloyd v. North Carolina, cert. granted*, 486 U.S. ___, No. 87-6833 (1988). Petitioner sought this alternative relief because this Court disfavors summary reversal, but the issue did not require full briefing and argument. However, in light of the November 18, 1988 Order of the Supreme Court of North Carolina reinstating its prior opinion, discussed in Part I of this brief, it no longer

appears that any purpose would be served by remanding the case to the Supreme Court of North Carolina. The North Carolina Court is obviously not willing to move on this issue without explicit direction from this Court.

However, the Petitioner still believes that summary reversal is the most appropriate action for this case. The issue before this Court has been as thoroughly litigated as any criminal law issue in recent North Carolina history. After this Court issued its opinion in *Mills*, the Supreme Court of North Carolina requested special briefing and, after considering the briefs, requested oral argument at a special term of Court, solely on the question of the applicability of *Mills* to the North Carolina capital sentencing procedure. The opinion of the Supreme Court of North Carolina in *McKoy* set out the State's several contentions and relied upon them to the extent that the court declared itself "unable to conclude with any degree of certainty that *Mills* rendered [the North Carolina] capital sentencing procedure constitutionally infirm." *State v. McKoy*, 323 N.C. 1, 44, 372 S.E.2d 12, 35 (1988). In dissent, Chief Justice Exum wrote that the majority's opinion "stands *Mills* and the Eighth Amendment jurisprudence upon which it rests upon their respective heads." *McKoy*, 323 N.C. at 54, 372 S.E.2d at 45 (1988) (Exum, C.J. dissenting).

The petitioner recognizes that summary decision is not favored by the Court, and "should be reserved for palpably clear cases of constitutional error." *Eaton v. Tulsa*, 415 U.S. 697, 707 (1974) (Rehnquist, J. dissenting) (citations omitted), *cited in*, Stern, Gressman and Shapiro, SUPREME COURT PRACTICE 282, n.82 (6th ed. 1986). Nevertheless, this Court has recently employed summary reversal in a criminal case on certiorari from state direct appellate review. *Olden v. Kentucky*, 488 U.S. ___ (1988). In *Olden*, "[t]he Kentucky Court of Appeals failed to accord proper weight to petitioner's Sixth Amendment right . . . ." *Id.*

This is an even more compelling case for summary reversal. *Mills v. Maryland*, 486 U.S. ___ (1988) is recent and controlling precedent of this Court which is contrary to the decision of the Supreme Court of North Carolina. This Court held in *Mills* that the Eighth Amendment forbids instructions which lead a

juror to believe that only those mitigating circumstances could be considered which were unanimously found to exist. The only pertinent way in which the North Carolina system differs from the one condemned in Maryland is that in North Carolina the judge explicitly directs the jury that it may not consider mitigating evidence if the jury is not unanimous, while in Maryland that unconstitutional result was merely implied. Whatever else may be said, *Mills* explicitly and authoritatively answers the question whether states may employ a unanimity requirement as to mitigating evidence in structuring their capital punishment schemes with a resounding "no."

Secondly, the recently more-favored remedy employed in such situations, granting the writ, reversing and remanding a judgment to the lower court for reconsideration in light of intervening precedent, *see Stern & Gressman* at 279, n.73 and accompanying text, has already been employed on this issue, *Lloyd v. North Carolina*, __ U.S. __, No. 87-6833 (1988) and has failed to achieve any reasoned reconsideration by the North Carolina Supreme Court. When this Court granted, vacated and remanded *Lloyd*, it had already been apprised of the North Carolina Supreme Court's treatment of *Mills* in the instant case. This Court need not accept cases from different states in order that the law as enunciated in a case arising from a particular state court be applied elsewhere.

Further, the State has had an extraordinary amount of time to marshal its best arguments before this Court. The petition in this case was docketed on November 17, 1988. The State sought and obtained extensions of time to delay filing its brief in opposition until January 30, 1989. Thus, the State enjoyed a longer period of time to prepare and file its brief in opposition than most litigants before this Court have to prepare and file a brief on the merits. Sup.Ct.R. 35.2. Indeed, the State's twenty-one page brief in opposition spends practically no time arguing that the issue before this Court is not worthy of the grant of certiorari but instead argues the merits of the case. Under these circumstances, further delay and briefing by the State is neither necessary nor desirable.

CONCLUSION

Petitioner respectfully requests that this Court grant the writ and summarily reverse the judgment of the North Carolina Supreme Court insofar as the death sentence was imposed in this case in violation of the Eighth and Fourteenth Amendments to the United States Constitution as construed in this Court's decision in *Mills v. Maryland*, 486 U.S. __ (1988). Alternatively, Petitioner respectfully requests that this Court grant the writ.

Respectfully submitted,

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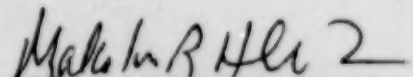
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Supplemental and Reply Brief in Support of Petition for Writ of Certiorari was served on the State of North Carolina by depositing a copy of the same in an official depository of the United States Postal Service, in a postage-paid envelope, addressed as follows:

Ms. Joan H. Byers
Special Deputy Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina

This the 13th day of February, 1989.



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